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**Rights, Risks and the Value of Life:**

**A critical analysis of the Right to Life under the European Convention on Human Rights**

*The right to life has become increasingly debated in recent years and is of particular interest and importance to the medical profession. As it is enshrined under Article 2 of the European Convention on Human Rights, it is one of the most clearly developed provisions of that treaty. This paper argues that courts assume the sanctity of life in their judgements and that judicial treatment of Article 2 constitutes an instrumental policy approach based on risk, rather than an attempt to remain loyal to rights based reasoning. These two elements are criticised as antithetical to the concept of rights and a return to a rights based approach is argued for.*

## 1. Introduction:

This paper will examine the right to life under Article 2 of the European Convention on Human Rights as it has been developed by the Strasburg Court and the domestic courts of England and Wales. It will be argued that judicial treatment of Article 2 takes the form of a two stage policy analysis. The first stage is one of assumption, whereby human life is assumed to be of intrinsic value. In the second stage, courts engage in a risk based analysis of the relevant policy or action and ask whether the level of risk to life was appropriate in the circumstances. In this paper I take issue with both stages of this risk driven approach, concluding that if it is accepted, we are no longer engaging in a rights based analysis. Such an analysis is of particular importance to medical professionals, because the patient's right to life may very well be seen as the correlative of the Hippocratic Oath. Understanding one more is therefore to understand the other better.

In the first section, I will define exactly what we mean when we talk of a 'right to life'. I will then move on to demonstrate the existence of the assumption that human life is of intrinsic value by examining how

the courts deal with the issue of suicide under Article 2. In the third section, I will criticise this assumption as inappropriate within a legal context. In the fourth section, I will demonstrate the prevalence of a risk based analysis in the reasoning of the courts and argue that it is the unifying element of the positive and negative obligations. The fifth section will argue that risk based analyses are antithetical to rights and morally inappropriate under a rights based treaty.

**2. Rights Related to Life:**

Before we go any further, it is important to settle what manner of beast we are dealing with. When we say 'a right to life', what do we mean? I have detailed a general theory of rights as part of a system of human rights reasoning elsewhere.[1] In brief, my conclusion was that it was meaningless to talk of general rights to abstract concepts such as 'life' or 'free speech' and that Convention articles are better understood as legal principles encapsulating a particular set of values. Each legal principle in the Convention will justify a number of narrow rights. Such rights are always rights *that* something happen or not happen. In the context of what we usually call the 'right to life', these include the right to be rescued from a hostage situation, the right to be treated with due care and skill at a hospital and the right to self defence. When we speak of a right to life, we are actually referencing a group of rights that flow from the application of the principle that all other things being equal, life should be protected. These rights are narrow and apply in an all or nothing way, identical to that of legal rules.

Consider the following example. Bob attacks Sarah with a knife, intent on murdering her. Sarah, in a moment of blind panic and fear, manages to grab the knife and stab Bob instead. If it were the case that Bob and Sarah both had a general 'right to life' then Sarah's act would be a violation of Bob's right. We would then have to go down the theoretically murky route of justifying Sarah's breach of duty. Even if we succeed in justifying her breach, we would be admitting that this 'right to life' was not something we could justify upholding in all circumstances. If that were the case we would be left in the odd position

[1] Green, 'A Philosophical Taxonomy of European Human Rights Law', [2012] E.H.R.L.R., Issue 1, pp 71-80

where Bob's right to life held no correlative duty in certain situations. It would therefore be pertinent in only *some* of the circumstances it purported to cover.

Another option under the 'general rights' view might be to say that when Bob attacks Sarah he temporarily loses the benefit of his right to life. This position is even less tenable than the first. To illustrate this, imagine a third person in our little drama; we shall call him Steve. Steve is disposing of his piano in the building above Bob and Sarah, and decides to do so by recklessly throwing it out of the window. It lands on Bob and squashes him flat. If Bob possessed a single 'right to life' and temporarily lost the benefit of it because of his attack on Sarah, then Steve would have not breached Bob's rights. This position jars so much with common sense that it clearly must be wrong.

If we accept that general rights do not exist and that the realm of generality is covered by values and principles, neither of these problems arise. We can conclude that in the situation of Bob and Sarah, Bob simply has no right against Sarah not to be stabbed by virtue of his attack upon her. He still has a right against Steve not to be the victim of careless piano flinging. This is because rights are individuated and narrow, justified by general principles rather than being synonymous with them. It thereby becomes apparent that adopting a 'narrow rights' model is in every way more advantageous. Under this view it is still important that life is protected in a general sense, as can be seen from the existence of the general principle. The narrow model allows us to conclude however that in certain circumstances we cannot extend this general importance to the granting of a right against people when morality demands otherwise. Now that we understand the form of 'the right to life' under Article 2, we can move on to consider its substance.

**3. Intrinsic Value and Article 2:**

We can now turn to the question of what the principle in Article 2 has been taken to be, or to put it another way, what can be said of the judicial treatment of the value of life. For analytical reasons, it is important to distinguish between such treatment and the abstract question of what the value of rights

protecting life *might be*. As I have explained elsewhere, when interpreting legal principles, abstract moral examination of the values that underpin them is essential.[2] However, the immediate task is to produce (as far as is possible) a morally neutral interpretation that fits the case law and then compare it to an alternative and abstracted conception of rights protecting life, in order to assess the morality of the former interpretation. This will allow us to ask whether the conception that can be discovered in judicial treatment is meritorious.

Before considering the case law however, it is important to remember the text itself:

> Article 2 – Right to life
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection.[3]

[2] This is an interpretivist argument but strictly speaking not one of Dworkinian interpretivism. The Dworkinian position, so far as it can be simply stated, is that law is the best moral interpretation of a particular community's legal practices. For one view on interpretivism as natural law, see: Green 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality' *European Journal of Legal Studies*, Vol. 4, Issue 1 (Summer 2011), pp 121-150. Dworkin's own approach is subtly different and best explained in: Ronald Dworkin, *Justice in Robes* (Belknap Harvard, 2006) pp 1-35. A further complexity that is not dealt with in the Dworkinian account and that is especially important when dealing with the interpretation of Convention articles, is the distinction and relationship between values (of which the value of life is one) and principles (of which the notion that the value of life should be protected is one). On this point see: Green, 'A Philosophical Taxonomy of European Human Rights Law', [2012] E.H.R.L.R., Issue 1, pp 72-77. These questions, whilst interesting, go beyond the scope of this paper and should be considered separately, at least for present purposes.

[3] European Convention on Human Rights 1950

The textual emphasis is largely neutral as to the *value* of life. The only deductions we can make are as follows: the word 'everyone' in subsection 2(1) in conjunction with subsection 2(2)(a) suggests that the value of life is equal for all people; and subsections 2(2)(b) and (c) indicate some scope for taking public order into account, which can be tied back to a respect for public safety and *ipso facto* the importance of life itself.[4] But the idea that a 'human right' must be both universal and practical is trite to the point of being uninteresting. What *is* interesting is the fact that Article 2 is silent on *why* life is worth protecting (an absence of justification common to all the substantive articles of the Convention). No doubt this arose from political expediency and the conclusion that a simple assumption would be both straightforward and uncontroversial. It nonetheless provides space for varying interpretations of life's value. One attractive possibility is that the very silence of Article 2 on this point allows for the freedom of conscience guaranteed by Article 9 of the Convention. It allows people to make up their own minds as to the intrinsic value of life or otherwise. In any event, it is judicial doctrine that we must look to in order to settle what this relatively blank slate has resulted in.

Unfortunately, for the purposes of this analysis if not in general, judicial treatment of the value of life is quite sparse. Where courts really betray the existence of an assumption of the intrinsic value or 'sanctity' of life is in marginal and difficult cases concerning suicide. There are two main types of case to consider in this regard. The first are cases concerning a positive right to die and the second are cases concerning the state's duty in respect of individuals attempting unassisted suicide. Both issues are of obvious concern for the medical profession, as well as being of general moral interest. This second group of cases are relevant because they touch on, though unfortunately only in passing, the important question of whether rights under Article 2 can be waived.

[4] Note that the vast majority of states within the Council of Europe have signed Protocol 13 to the Convention, which outlaws the death penalty, thereby removing that exception from Article 2(2)(b). Even more states have ratified Protocol 6, which outlaws the death penalty in all circumstances save wartime. It is still useful however to remember its presence for the interpretive task we are currently engaged in.

The right to die is considered in *Pretty v United Kingdom* Application no. 2346/02, 24 July 2002.[5] In that case the applicant, who was suffering from motor neurone disease, claimed *inter alia* that her rights under Article 2 were violated by the refusal of the Director for Public Prosecutions to make a declaration that her husband would not be prosecuted for assisting her in committing suicide, under Section 2 of the Suicide Act 1961. In the UK House of Lords, Lord Bingham held that there was no right to die under Article 2 on the basis that the general thrust of that Article was 'to reflect the *sanctity* which, particularly in western eyes, attaches to life'.[6] The European Court upheld this analysis of Article 2 and echoed Lord Bingham's use of the concept of 'sanctity' in its own judgement.[7] Indeed, the Court went so far as to deal with the question of a right to suicide under Article 8 rather than under Article 2.[8] Under Article 8 the Court went even further than making these explicit references to the sanctity of human life, balancing the right to make choices about whether to live or die against 'considerations of public health and safety'.[9] There can be no doubt, based on this analysis, that the judgements of both the domestic and European courts in the *Pretty* case evidence an assumption that human life has intrinsic value, detached from its instrumental importance to the interests and autonomy of individual people.

This assumption can also be found in cases dealing with unassisted suicide. The recent judgement of the UK Supreme Court in *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2 presents a useful focus for analysis. In that case a young lady of 24 years was admitted as a voluntary patient to the defendants' hospital to receive treatment for recurrent depressive episodes and possible psychosis suggesting a serious depressive disorder.[10] However, despite the severity of her condition, she

[5] see also *Haas v. Switzerland*, Application no. 31322/07, 20 January 2011, in which the law in *Pretty* was confirmed.

[6] *The Queen on the Application of Mrs Dianne Pretty (Appellant) v. Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)* [2001] UKHL 61, [5]

[7] *Pretty v United Kingdom*, Application no. 2346/02, 24 July 2002, [65] (emphasis added)

[8] Ibid. 67

[9] Ibid. 74. This use of a qualified right to deal with the substance of an absolute right is inappropriate. This is because dealing with the matter under Article 8 permits the courts to engage in a balancing analysis with a value that under Article 2 would not be open for balancing. I am generally sceptical of the balancing metaphor due to its capacity to cloud consistent moral reasoning (see Green, 'A Philosophical Taxonomy of European Human Rights Law', *supra* note 1). The use of the metaphor to deal with issues of life and death is therefore particularly concerning, given the great importance of the issue.

[10] *Richard Rabone and Gillian Rabone v. Pennine Care NHS Foundation Trust* [2009] EWHC 1827 Q.B., [8]

was not detained under the Mental Health Act 1983 and hanged herself from a tree whilst on home leave. These tragic circumstances lead the Supreme Court to rule that the operational duty under Article 2, to prevent in certain circumstances a person from threatening their own life or the life of another, had been breached by the defendants.

The question of waiver was only obliquely addressed by the Court, and even then only in the speech of Lady Hale, and was largely placed to one side. Drawing on the judgement of the European Court of Human Rights in *Mammadov v Azerbaijan,* Application No 4762/05, 17 December 2009, Lady Hale held that:

> It does seem fairly clear that there is no general obligation on the State to prevent a person committing suicide, even if the authorities know or ought to know of a real and immediate risk that she will do so…This is understandable. Autonomous individuals have a right to take their own lives if that is what they truly want. If a person announces her intention of travelling to Switzerland to be assisted to commit suicide there, this is not, by itself, sufficient to impose an obligation under Article 2 to take steps to prevent her.[11]

This passage suggests that the law recognises a sphere of autonomy in relation to staying alive that is firmly vested in the individual in question. With respect however, Lady Hale's judgement does not reflect the judgement in the case she relies on. In *Mammadov* the Court describes:

> …a positive obligation…to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself. However, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices

[11] *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [100]

> which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[12] [*Citations omitted*]

Conspicuously absent from this analysis is the question of whether a person can actually waive their rights under Article 2. The concern is rather whether imposing certain obligations on the relevant authorities is appropriate. Similarly in *Keenan v. United Kingdom*, the most famous case concerning mental illness under Article 2, no violation was found because, not knowing the deceased had schizophrenia, the prison authority had done all that was reasonable at the time.[13] This finding was justified by the same reasoning present in *Mammadov*: that the salient consideration was *the extent of the burden* that should be placed upon the relevant authority.

This element of the courts' approach to Article 2 is something that I will return to later when considering risk. It is likely that in *Rabone* Lady Hale had Article 8 in mind when holding that an individual possessed of the proper capacity should be afforded the decision of how and when to die. There is nothing in the authority her Ladyship cited to indicate that the basis for this lies in Article 2. In any event, although the courts seem happy to make polemic statements concerning the right to suicide, when the facts get difficult they shy away from asking whether a waiver of other rights under Article 2 has actually taken place. This suggests that stress is placed upon the value of life *in general* above and beyond the question of whether a person's life is still valuable *to them*. Once again, the courts are dealing in sanctity rather than autonomy.

The judgement in *Rabone* illustrates well this hesitancy in dealing with questions of waiver on difficult facts. The Supreme Court Justices all make references to the deceased's condition in broad terms,

[12] *Mammadov v Azerbaijan*, Application No 4762/05, 17 December 2009, [36]

[13] *Keenan v. United Kingdom* (2001) ECHR [242] In this case a prisoner was sectioned after displaying suicidal tendencies that unfortunately manifested in a successful attempt. A violation of Article 3 was however found due to inadequate medical treatment.

referring to ‘mental illness’ and ‘psychiatric patients’ as a unified class of persons.[14] They also speak of the ‘likelihood’ of reduced or absent capacity, rather than being determinative on the issue.[15] Whilst this might be defensible on different facts, the deceased in *Rabone* was documented at first instance as suffering from psychosis, which presumably affected her hold on reality.[16] If this finding of fact was sound then there should have been no problem in categorically dealing with the lack of capacity to waive Article 2 rights and assert a right to suicide.

The general terms of judgements concerning suicide suggests a pervasive unwillingness to engage with the psychological fact that certain ‘mentally ill’ persons completely understand the nature and quality of their actions and are firmly rooted in reality. There is an initial and important distinction to be made between cases such as *Rabone*, where the presence of psychosis points to an inability to hold true beliefs about one’s own condition or situation, and cases of major depression that do not present psychosis, thereby not raising the issue of endemic unreality.[17] There is even some suggestion that those suffering from depression in conjunction with schizophrenia may experience periods of lucidity during which they are capable of rationally contemplating suicide.[18] These subtleties are simply not accounted for in the doctrine under Article 2. Ironically, the finding of no violation in *Keenan*, on the basis that the authorities’ ignorance of the schizophrenia was the salient factor, does make space for a differentiation between mere suicidal tendencies and suicidality emanating psychosis. It is disappointing that the Supreme Court in *Rabone* did not address this potential in a satisfactory way.

The commonly accepted definition of capacity or competence to engage with the notion of suicide includes the following factors: the ability to communicate a choice; the ability to understand relevant

[14] *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [15, 26, 27, 30, 33, 101, 102]

[15] Ibid. 30

[16] *Richard Rabone and Gillian Rabone v. Pennine Care NHS Foundation Trust* [2009] EWHC 1827 Q.B., [8]

[17] A Rudnick, ‘Depression and competence to refuse psychiatric treatment’, *Journal of Medical Ethics* (2002) Vol. 28, pp 151-155; 151-152

[18] Jeanette Hewitt, ‘Schizophrenia, mental capacity, and rational suicide’, *Theoretical Medicine and Bioethics* (2010) Vol. 31, pp 63-77, 71-75

information; the ability to appreciate the nature of the situation and its likely consequences; and the ability to manipulate information rationally.[19] When courts blur the distinction between those psychiatric patients who have these capacities and those who do not they risk falling into the rather insidious line of thought forwarded by Edwin Shneidman when he stated, "It is not a thing to do while one is not in one's best mind. Never kill yourself when you are suicidal."[20] As well as being darkly circular, such a broad brush does serious violence to the dignity of those who make a competent decision to take their own lives, impliedly assuming full blown insanity by the bare fact of suicidality.[21]

This unwillingness to deal with the fine distinctions of suicidality and the question of whether rights under Article 2 can be waived is symptomatic of the primacy of sanctity in the judicial treatment of Article 2. A model that placed autonomy, rather than sanctity, as central would consider the question of waiver one that had to be settled clearly, rather than dealt with in vague terms. The difficulty and controversy of the issue can scarcely be invoked to account for this omission, as the more complex the question the more morally important it becomes to reach a defensible position as clearly as possible.

**4. Intrinsic Value and Legal Rights Relating to Life:**

The notion of a *legal* assumption that life has intrinsic value is objectionable on two counts. Firstly, it is not the business of the law, as an emanation of collective authority, to make decisions on matters of intrinsic value that are ethical in nature. As Ronald Dworkin has forcefully argued, that is the province of

[19] ilen Berg, Appelbaum, and Grisso, 'Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions', *Rutgers Law Review* (1996) Vol. 48, pp 345, 351-362; Grisso and Appelbaum, *Assessing Competence to Consent to Treatment: A Guide for Physicians and Other Health Professionals* (Oxford University Press, 1998), pp 31-60. See also and generally Chapter 4 of Meisel and Cerminara, *The Right to Die: The Law of End-of-Life Decision Making* (Aspen Publishers, 2004). Interestingly, this definition accords remarkably with a capacity theory of moral responsibility; see: Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), pp 241-252. This similarity supports the notion that the decision of when it is best to die is one with important implications for the dignity and value of an individual's existence viewed in the round.

[20] Shneidman, 'Some essentials of suicide and some implications for response' in Roy A. ed. *Suicide* (Williams & Wilkins, 1986), pp 1-16

[21] The tendency to do so is strikingly similar to the Foucauldian critique of psychiatry as attempting to normalise the patient into a pre-conceived paradigm of social acceptability. See generally: Michel Foucault, *Madness and Civilisation: A History of Insanity in the Age of Reason*, Richard Howard trans. (Vintage Books, 1988)

the individual.[22] The justification he presents is that it is a basic requirement of ethical responsibility for individuals to settle their conceptions of the intrinsic value of human life. This is because by accepting that their life is valuable in itself, they recognise their own existence as an important challenge worth meeting. If this revelation is forced upon them however, then the responsibility is abrogated and the value of their independent ethical development is stolen from them. That is what makes judgements about the intrinsic value of life matters of personal ethics. A legal assumption that life has intrinsic value, rather than instrumental importance to autonomy, is therefore an illegitimate imposition by an external collective. It is permissible for the law to hold *autonomy* to be intrinsically valuable where it is not so in respect of life, because autonomy is essential for the independent ethical decision making that law abrogates when it makes a judgement as to life's intrinsic importance. To hold autonomy to be of intrinsic value is therefore consistent with ethical independence in a way that a similar judgement about life is not.

It is not sufficient to argue that the assumption under Article 2 does not violate ethical independence because no elaboration about *why* life has intrinsic value is made. After all, it is wholly possible that life has *no* intrinsic value in the same way, for example, that love or happiness does. We would feel justified in saying that a world with more love or happiness is just better off as a result but would not necessarily say the same of a world with more human life. Indeed, widespread concern about the rising global population seems to suggest the opposite. Therefore the mere fact of assuming some kind of intrinsic value to human life goes beyond the province of law and into personal morality. This is particularly insidious in the context of the European Convention, when Article 9 therein protects religious freedom and freedom of conscience. As I suggested above, one attractive interpretation of the absence of commentary on the value of life in Article 2 is that the freedom of conscience guaranteed by Article 9 is protected. It is after all a matter of conscience to decide whether or not life is sacred.

[22] Dworkin, *Life's Dominion* (Vintage Books, 1994), pp 69-101, 148 -159. Note that this is very different from tying 'the right to life' to human dignity as done by the German Federal Constitutional Court *inter alia* in Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 Neue Juristische Wochenschrift (NJW) 751 (2006). The concept of human dignity can be as easily linked to autonomy as to a belief about the intrinsic value of life.

The second reason that an assumption of life's sanctity is objectionable is that it is totally otiose to the notion of there being legally enforceable rights that protect the continuing existence of human beings. It is uncontroversial that rights protecting our existence enable the furtherance of our other interests. One cannot enjoy art, read books or make love without actually being alive. It is perfectly consistent to hold that one has a right against the state to be protected to a certain standard against violent third parties, even when that state is completely agnostic as to the intrinsic value of one's existence. This is because, for reasons of autonomy and ethical independence, it is for the individual to impose purpose and meaning on their own existence and it is for the state to create conditions under which each of us can do so.[23] None of this touches on the intrinsic value of life but rather on its extrinsic or instrumental value to our realisation as individuals. The same holds for any of the myriad duties the state has under Article 2, such as refraining from the taking of life or the duty to investigate certain deaths as a means of ensuring relatively safe conditions for human flourishing.

The conclusion that must be reached is that assuming the sanctity of life places the law outside its proper authority without any real reason for doing so. One might think that this is an instance of inappropriate legal moralising. Another possibility is that the judiciary are falling prey to what has been described by Saprai and Letsas as 'the myopic sting': the notion that because an area of law is taxonomically defined by a particular value (in this case the value of life), that is the *only* value relevant to it.[24] It is not impossible to imagine the mistake running something like this: because only the value of life can justify rights protecting life, we must be dealing with life's intrinsic value. Such reasoning is clearly in error but easy enough to understand because we are dealing with courts concerned with practical problems rather than theoretical consistency. A less cynical position might remember that judges are human too and might simply want to believe in the sanctity of life, as I think deep down the vast majority of us do.

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[23] This observation *should* have been of practical importance in *R (on the application of Tony Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin), in which a declaration under Section 4 of the Human Rights Act 1998 that Section 2 of the Suicide Act 1961 was incompatible with Article 8 of the Convention was denied. The importance of personal autonomy to Article 2 of the Convention was sadly absent from the judgement once again.

[24] George Letsas and Prince Saprai, 'Private Law and Moral Practices Part 1: Contract', cited in draft and with permission: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972910, last accessed on 15 March 2012

**5. Article 2 and Risk:**

The assumption of intrinsic value under Article 2 has done more than offended these theoretical sensibilities. It has also prompted the courts to engage in an analysis antithetical to a rights based approach by engaging in a risk based test. The central question that the courts ask themselves is whether, given the importance of human life, the risk taken by the relevant authorities was strictly necessary.

This risk based analysis is common to the negative and positive (policy based and operational) duties under Article 2. Two cases in particular demonstrate this: in respect of the negative duty the case of *Andronicou and Constantinou v. Cyprus* Application no. 25052/94, 9 October 1997 and *Oneryildiz v. Turkey* (2004) 41 EHRR 20 in respect of positive obligations. The first case concerned the rescue of a lady from a hostage situation and the second concerned the deaths of several slum dwellers adjacent to a state owned waste disposal facility. I will deal with each in turn.

The negative obligation to refrain from taking life might seem quite categorical on its face but the judgement of the Court in *Andronicou* demonstrates that this is in fact not so. The facts were as follows. A young lady was held hostage by her fiancé in their flat by the use of a double barrelled shotgun. There was ample evidence to suggest that he was willing to kill. It was decided to bring in a platoon of Police Special Forces ('MMAD') to conduct a rescue operation. A plan was put in place whereby two trained negotiators would distract the gunman over the telephone while four MMAD operatives would enter the flat, two capturing him, a third rescuing the hostage and a fourth providing support. They were instructed to only use proportionate force and fire only if their lives or the hostage's life were in danger. If the room was dark they were told to use the lights attached to their machine guns. The gunman proved unreceptive to further attempts at negotiation and it was concluded that he intended to commit suicide after killing his hostage. When the plan was executed the first officer entered the room and was shot by the gunman in the shoulder, causing him and the third officer to fall backwards. The gunman then fired a second shot that hit the hostage. The second officer believed that the first was seriously injured and the second was dead. He

shot the gunman several times with his machine gun, admitting subsequently that he had been trained to shoot to kill when shot at. As a result of the operation, the gunman died and the hostage was severely wounded and died soon afterwards.

In assessing whether there had been a breach of Article 2 the Court held the following:

> The Court's sole concern must be to evaluate whether in the circumstances the planning and control of the rescue operation including the decision to deploy the MMAD officers showed that the authorities had taken appropriate care to ensure that *any risk to the lives of the couple had been minimised* and that they were not negligent in their choice of action.[25] [*Emphasis added*]

They concluded on this matter that:

> …the rescue operation was mounted with the sole aims of freeing [the hostage] and arresting [the gunman] and in a manner which minimised to the greatest extent possible any risk to life…[26]

From these two quotations it is clear that the language of risk management is pervasive in the *Andronicou* judgement.[27] The overall assessment of the Court was that no violation of Article 2 had taken place. One interesting portion of the judgement is the treatment of the use of machine guns and whether that

[25] *Andronicou and Constantinou v. Cyprus*, Application no. 25052/94, 9 October 1997, [230] (emphasis added)

[26] Ibid. 240

[27] The language of risk is used in various other cases covering the negative duty. See for example: *McCann et al. v. The United Kingdom*, Application no. 18984/91, 27 September 1995, [115, 136, 188]; *Ergi v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 July 1998, [79-86]; *Isayeva, Yusopova and Bazayeva v. Russia*, Application no. 57947-49/00, 24 February 2005, [171]; *Gül and others v. Turkey*, Application no. 22676/93, 14 December 2000, Dissenting Opinion of Judges Sajó Andtsotsoria; *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. and Others v. Ireland* [1992] ECHR 68, [77];

constituted absolutely necessary force. The majority judgement held that in the circumstances the use of force was proportionate to the risk:

> It is clearly regrettable that so much fire power was used in the circumstances to neutralise any risk presented by [the gunman]. However, the Court cannot with detached reflection substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment…[28]

The best way to understand the test applied by the majority is therefore whether the assessment of risk made at the time was one that a reasonable authority figure might have made in the circumstances presented. In his dissenting opinion, Judge Pikis also applied a risk based analysis, but disagreed *inter alia* on the basis that the use of machine guns 'increased unnecessarily the risk'. From the language of this disagreement it is clear that a risk based approach is pervasive in the Court's approach to the negative duty under Article 2.

It now falls to consider the positive duty. The case of *Oneryildiz* involved a methane explosion causing a landslide of refuse from a waste disposal facility onto nearby unlawful slum dwellings, resulting in several deaths. A violation of the operational duty under Article 2 was found on the basis that the state was perfectly aware of the risk and took no steps to avoid the potential harm:

> …it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of *the risks inherent* in methanogenesis or of the necessary preventive measures…[29]

[28] *Andronicou and Constantinou v. Cyprus*, Application no. 25052/94, 9 October 1997, [241]

[29] *Oneryildiz v Turkey* (2004) 41 EHRR 20, [101] (emphasis added)

It was further held that information relating to the risk had not been made available to the victims and that as a result they could not be deemed capable of having made an informed choice to take that risk upon themselves:

> …the Government were unable to show that any measures were taken…to provide…information enabling [the slum dwellers] to assess the risks they might run…In any event, the Court considers that in the absence of more practical measures *to avoid the risks to the lives of the inhabitants*…even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities.[30]

This emphasis on inappropriate risk taking is identical to that under the negative obligation, save that it relates to positive action as opposed to refraining from the taking of life without good reason.[31] In this respect, appropriate apportionment of risk is the single thread that connects the positive and negative elements of Article 2 together and is the concept that does the majority of the analytical work in Article 2 jurisprudence.

**6. Risk and Rights:**

Is the use of risk as a legal concept offensive to the notion of moral rights? Is it even distinct? My own belief is that both of these questions can be definitively answered 'yes'. The answer to the second of these questions is of great assistance in answering the former and so should be dealt with first.

In order to demonstrate the distinction between rights and risk it is useful to turn to the law of tort, an area of law perhaps more familiar to medical practitioners and lawyers alike. In a useful paper on the nature of rights in private law, Robert Stevens reminds us of the distinction in the English law of torts between

[30] Ibid. 108 (emphasis added)

[31] Once again, the language of risk is common to many judgements concerning the positive obligations. See for example: *Osman v. United Kingdom* [1998] ECHR 101, [116]; *Louisa Watts v the United Kingdom* [2010] ECHR 793, [82-87]; *Kiliç v. Turkey*, Application no. 22492/93, 28 March 2000, [63]

*iniuria* and *damnum*, which is to say injury and damage.[32] He rightly demonstrates that injury, which can also be described as the commission of a wrong, is distinct from the loss that flows from that wrong. If you punch me in the stomach and I suffer pain as a result, the wrong is the punch and the pain the loss. This is an important distinction in the law of torts because the commission of a wrong does not necessarily result in loss. If Jeremy, a famous author, were to be libelled only to receive an increased sale of his books as a result of the media attention, then he could not claim for consequential loss based upon the damage to his reputation.

There is another important reason why a wrong and any resulting loss should be treated as separate. If you are subject to inhuman and degrading treatment then you have clearly suffered a wrong and at least some nominally quantifiable loss. However, if Jeremy, who in addition to being a famous author is also a masochist, is subject to degrading treatment as a result of a sexual act, he might have received the same treatment as you but no wrong by virtue of his consent. Due to the fact that loss is calculated on the basis of bare fact – what actually happens to an individual – Jeremy would have suffered loss were it not for his consent. A wrong in private law is therefore observably linked to autonomy in the sense that it gives us the capacity to either accept or reject various types of action or inaction in respect of ourselves. If we moved straight to loss without the mediating role of the wrong then we would risk losing this important protection of our autonomy.[33] Such a move would require the law to just assume that certain consequences would always be unwanted because they were technically 'loss'.

[32] Robert Stevens, 'Rights and Other Things' in Robertson and Nolan (eds.) *Rights and Private Law* (Hart, 2011), pp 115-150, 118

[33] This basic confusion is observable in the context of the criminal law in the case of *R v. Brown* [1994] 1 AC 212, where the House of Lords upheld the convictions of several men arrested for unlawful and malicious wounding as a result of consensual sadomasochistic sexual acts. Although their Lordships paid lip-service to the notion of consent, the thrust of the judgement is observably that a particularly invasive form of harm (an interchangeable concept with loss for present purposes) was being suffered that should not be permitted or encouraged as a matter of public policy. So much for autonomy.

Stevens also reminds us of a principle found in Hohfeldian reasoning, that where there is a wrong there is a breach of a duty and the correlative to a duty is a right.[34] Wrongs are therefore the violation of rights, which makes rights quite distinct from loss. This basic distinction is very useful in the present context, as it shows us exactly why rights are distinct from risks. If the government takes a certain risk in respect of my life, it may have breached its duty to me and thereby violated my right. That is not necessarily the case however. Let us go back to the question of unassisted suicide. If I am suffering from major depression absent psychosis and fulfil the conditions of competence, then it is still possible for the government to take a risk in respect of my life by leaving the question of suicide completely up to me. It is however not possible for them to have violated my right by allowing me to commit suicide because I have waived my right to their protection by choosing to take my own life. Indeed, if they take steps to minimise the risk by assuming that my suicidality is justification enough to prevent me from taking my own life, they have most likely violated my right to choose my own manner and time of death.[35]

This distinction also illustrates why the answer to the question, 'is a risk based approach objectionable to the idea of moral rights' must be affirmative. The notion of limiting the state's obligations to minimise the risk of loss goes hand in hand with the assumption that the object of loss is of unquestionable value to the person who stands to lose it. It is only by injecting the filter of the right holder's choice that we are able to properly respect the value of autonomy and the importance of ethical independence and responsibility. Moving straight from risk to loss completely misses out this vital step and therefore presents a mode of legal reasoning that is offensive to the notion of moral rights that reflect the importance of individual freedom.[36]

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[34] Robert Stevens, 'Rights and Other Things' in Robertson and Nolan (eds.) *Rights and Private Law* (Hart, 2011), pp 115-150, 117; Wesley Hohfled, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1913) 23 *Yale Law Journal* 16, pp 28-59. It is worth noting that this theory of private law remains extremely controversial in both theory and practice. A good deal of legal academics view risk management as central to areas such as the law of torts.

[35] Note that this rights based analysis would not result in a finding of no violation in cases such as *Oneryildiz*, where the capacity to consent to danger could not be held to exist because insufficient information for informed consent existed.

[36] This is not to say that, in respect of the interest/will theory debate, the issue of free choice is completely dispositive of who holds rights or why individuals hold them. It is perfectly consistent to believe that I hold a right to write articles as a result *inter*

The use of a risk based analysis also has unfortunate incidental effects in respect of economic and social rights that are worth considering. It might seem odd for a paper discussing Article 2 to wander into the realm of social and economic rights but such a venture is not as strange as one might think. This is due to the conclusion in the first section of this paper, that Article 2 is only understandable as a series of specific rights ultimately justified by the (extrinsic) value of life. If our lives are worthy of protection, then it is entirely possible for a right to emanate from that principle that, for example, we should have access to certain types of healthcare under certain circumstances. The fact that this right is an economic or social right is no *conceptual* bar to it falling under the ambit of Article 2.

An interesting case study on this point is the *Keenan* case. There the Court held that the failure to provide adequate healthcare was a violation of Article 3 but not a violation of Article 2. The justification given for this was, as mentioned above, that there was no clear evidence at the time that Mark Keenan was suffering from a condition involving psychosis.[37] This conclusion may seem strange when one considers that the *reason* there was no clear evidence was in part the fact that the healthcare received was inadequate. In that sense, the inadequate healthcare can be viewed as a material contribution to the risk of suicide, to borrow a phrase from the English law of tort.[38] It simply cannot be the case on the facts that Mark Keenan made a competent choice to take his own life, as he was suffering from a form of chronic psychosis.[39] More to the point, the government's autonomy based argument was only touched on briefly by the Court and largely sidestepped, meaning that neither the issue of waiver nor the right to suicide was

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*alia* of my interest in intellectual development, whilst also holding that it would be a violation of my autonomy if I was coerced into doing so.

[37] *Keenan v. United Kingdom* (2001) ECHR 242, [94]

[38] *Fairchild v Glenhaven* Funeral Services Ltd [2002] UKHL [22]. It should be noted that 'risk' in the sense of a material contribution to risk in the law of causation is not the same as having a risk driven analysis of an entire substantive area of law. It is perfectly possible to speak of an act or omission constituting a material contribution to the likelihood of some particular outcome whilst not basing the entirety of one's legal analysis upon what risks should and should not be taken. This is so because, as already discussed, such an analysis abdicates the importance of autonomy. A rights based analysis, which emphasises the importance of autonomous choice, can therefore consider risk in the narrow causal sense without it devolving into a substantively risk driven approach.

[39] *Keenan v. United Kingdom* (2001) ECHR 242, [112]

dealt with.[40] If the inadequate healthcare materially contributed to the likelihood of his suicide because it failed to address his inability to make a rational choice, then the state could be said to have been responsible for his death. In *Keenan* the Court held that it was not.

The commonly accepted explanation for the finding of no violation under Article 2 is that the state had in place reasonable safety procedures when Mark Keenan was being observably suicidal and that unfortunately certain things just went wrong on the day in question.[41] Whether this was a justifiable conclusion or not, it still seems odd that the Court found the issue of healthcare to arise exclusively under Article 3.[42] The only justification given was that the argument above, that inadequate healthcare constituted a material contribution to the risk of suicide, was 'speculative' as it was 'not known why Mark Keenan committed suicide'.[43]

It should be clear that such a justification implicitly dismisses the relevance of a *material contribution* to the likelihood of suicide. Instead, the Court should be understood as implicitly assuming that the relevant test was whether 'but for' the inadequate treatment, Mark Keenan would have not committed suicide. Now, I make no claims as to which standard of causation is appropriate in this case. However, it is clear that the Court failed to meaningfully engage with this question under its Article 2 analysis. The claim I feel can be made with relative certainty is that if the Court had adopted a rights based approach with concern for the issue of waiver and the right to suicide, then the issue would have been more central. This may very well have resulted in a violation under Article 2 being found on the basis that materially contributing to the danger of suicide by omission of adequate medical treatment is something that a state should be under a duty to avoid. Asking whether the overall approach of the state was reasonable, that is to say whether it demonstrated an acceptable management of the risk, resulted in this issue receiving inadequate judicial treatment. This is because the focus was on the duty holder (the state) and not the right

[40] Ibid. at 92

[41] Ibid. at 99

[42] Ibid. at 101

[43] Ibid.

holder (Mark Keenan). Placing autonomy at the centre of legal analysis would have reversed this position and rendered the omission less likely.

Having a closer look at *Keenan* has therefore allowed us to make two general observations. Substantively the right to adequate healthcare has been unreflectively absent from Article 2 in circumstances where it is perhaps not justifiable. The fact that this right is nominally socio-economic is not enough to provide a reason why it should not be enforced in certain limited circumstances, such as those present in that case. Secondly, the risk based approach tends to lead the Court into making 'in the round' judgements as to the propriety of a particular situation, instead of looking at more technical questions, such as causation. In *Keenan*, were it not for the finding of a violation under Article 3, these failures under Article 2 may have resulted in a substantial injustice.

It must of course be said that in the vast majority of cases involving straightforward violations of Article 2, a risk based test and a rights based test will reach the same substantive result. I suspect, for example, that there is little that could have been added to Judge Pikis' descent in *Andronicou* by slavishly explaining the exact juridical instances of rights and duties that existed. The conclusion, whether based on an unacceptable increase of risk or on a failure to have due concern for the gunman and his hostage, would have been the same. That the risk based test works well in straightforward cases is no defence however, as it is in the difficult cases – those that concern the medical profession in particular – that the risk based test fails to account for moral complexities such as waiver. The virtue of rights is that they map out moral issues in a precise and clear way so that important interests do not get lost in an amorphous 'in the round' assessment. It cannot be argued that because the risk based approach is sufficient for easy cases that it is a generally defensible doctrinal position. Rather, it is the job of commentators to bring to light scenarios in which even our most solid modes of analysis begin to crumble.

**7. Conclusion:**

In this article I have argued that the current mode of legal reasoning under Article 2 is based on an underlying assumption that human life is of intrinsic value and that it employs a risk based analysis to establish violation. I have also argued that such an approach is inappropriate for moral and conceptual reasons in that it abrogates the important role and character of moral rights from legal analysis.

What has gone hitherto unsaid is that this abrogation is particularly insidious because it uses the rhetorical force of 'a right to life' without meaningfully engaging with the notion in any systematic or rights based way. It should be remembered that it is perfectly possible to protect life through a variety of legal mechanisms, such as the prohibition and punishment of murder in the criminal law or, to use an English example, via the tort of negligence and the Fatal Accidents Act 1976. Article 2 jurisprudence however falls under the European Convention of Human *Rights* and should take rights seriously.